KUNN REKON HOLDINGS SDN. BHD.

v.

PUBLIC PROSECUTOR & 2 OTHER APPLICATIONS

HIGH COURT MALAYA, SHAH ALAM
DATO' LOW HOP BING J
[CRIMINAL APPLICATIONS NO. 44-35-95, 44-3-96, 44-3-96]
16 FEBRUARY 1996

CRIMINAL PROCEDURE: *Affidavits - Use of - Affidavits sworn before Commissioner for Oaths - Whether could be used in a criminal Court - Whether use of affidavits prohibited - Whether necessary that affidavits be affirmed before Magistrate or Registrar - Criminal Procedure Code s. 424(1)(a) - Courts of Judicature Act 1964 ss. 3, 11(1)(c)(ii) & (iv) - Rules of the High Court 1980 Ors. 1. r. 2(2), 41.*

INTERPRETATION: *Section 424(1)(a) Criminal Procedure Code - Whether an independent section - Whether subservient to "any rules of Court" - Use of affidavits in criminal Court - Affidavits sworn before Commissioner for Oaths and not before Magistrate or Registrar - Effect.*

INTERPRETATION: *Order 1. r. 2(2) Rules of the High Court 1980 - Proper import - Whether to prohibit altogether application of rules of Court to criminal proceedings.*

WORDS & PHRASES: *"Subject to any rules of Court" - Section 424 Criminal Procedure Code - "Any proceeding" - Section 11(1)(c)(iv) Courts of Judicature Act 1964.*

The respective applicants in these criminal applications had sought to admit certain affidavits which they had sworn before a Commissioner for Oaths. In respect of the use of affidavits in a criminal Court, however, s. 424(1)(a) Criminal Procedure Code stipulates that *"subject to any rules of Court, any affidavit may be used in a criminal Court if it is sworn in the Federation before any Magistrate or Registrar"*. This being the case, the Deputy Public Prosecutor raised a preliminary objection, contending in effect that the affidavits, affirmed as they were before a Commissioner for oaths and not before a Magistrate or Registrar, had not complied with s. 424(1)(a), and so, could not be used in a criminal Court. The learned Deputy also invoked O.1 r. 2(2) Rules of the High Court 1980 (RHC), and argued that by reason of that Order, no provisions of the RHC, including those that regulate the use of affidavits, could have any application to a criminal proceeding. The applicants argued that s. 424(1)(a), by its very words, did not prohibit or exclude the use of an affidavit sworn before a Commissioner for Oaths, and that being so, the true purport of the section could only be that, in addition to the use of an affidavit sworn before a Magistrate or Registrar, an affidavit sworn before a

Commissioner for Oaths could also be used in a criminal Court. Before the learned Judge, the primary issues that arose were:

(1) whether s. 424(1)(a), on its true construction, was not an independent section and was subservient to the rules of Court.

(2) whether the provisions of s. 424(1)(a) prohibited or excluded the use of an affidavit in a criminal Court if such affidavit was sworn in the Federation before a Commissioner for Oaths and not before a Magistrate or Registrar.

Held:

[1] Section 424(1)(a) is an enabling provision under which an affidavit which is sworn in the Federation before any Magistrate or Registrar may be used in a Criminal Court. The Section is not intended to be an overriding, overpowering or a dominant provision, but is specifically enacted to make it "subject to any rules of Court".

[2] Section 424(1)(a) does not contain any prohibition or restriction that excluded an affidavit sworn in the Federation before a Commissioner for Oaths. That being the case, the section should be given a liberal interpretation, and further, it should be read together with O. 41 RHC, ss. 3 & 11(1) Courts of Judicature Act 1964 and r. 12 Commissioner for Oaths Rules 1993. It follows that the approach as suggested by the learned Deputy is too narrow and restrictive and is not consonant with the provisions of s. 424(1)(a).

[3] Order 1 r. 2(2) RHC is not intended to wholly or completely exclude the application of the rules of Court to criminal proceedings. Going by the decided authorities, it is clear that Rules of High Court are operative and apply equally to both civil and criminal proceedings. In the circumtances, this Court can only subscribe to the view that the provisions of O. 41 RHC that regulate the use of affidavits are operative and equally apply to both civil and criminal proceedings. The result is that, in addition to affidavits affirmed under s. 424(1)(a), an affidavit signed by a Commisioner for Oaths may also be used in a criminal Court.

[4] Under s. 11(1)(c)(iv) Courts of Judicature Act 1964 any Registrar and any person appointed by the Chief Justice to be a Commissioner for Oaths may *"administer oaths for swearing persons in **any** action, matter or **proceeding** which is pending or about to be instituted in any Court ...". "Proceeding"*, however, is defined in s. 3 of the Act as *"any proceeding whatsoever of a civil or criminal nature"*. Thus, by the use of the words *"any"* and *"proceeding"* herein, any person who is appointed a Commissioner for Oaths may administer oaths for taking any affidavit and such affidavit may be used for the purposes of any proceeding

whatsoever of a civil or criminal nature.

[5] The provisions of s. 11(1)(c)(ii) & (iv) had been restated in r. 12 Commissioner for Oaths Rules 1993. This represents a strong reaffirmation of the proposition that an affidavit sworn before a Commissioner for oaths may be used in criminal proceedings. A Commissioner for oaths, thus, is authorised by law to affirm an affidavit of a deponent for the purpose of using the said affidavit in a criminal Court. The respective affidavits of the applicants, hence, should be allowed to be used in the criminal proceedings herein.

Per curiam: Bearing in mind the voluminous judicial and administrative duties of a Magistrate or Registrar, it is inconceivable for s. 424 to require each and every affidavit to be affirmed by a Magistrate or Registrar before it can be used in a criminal Court. Clearly, s. 424 ought to be redrafted if that be the intention of Parliament.

[Objection overruled]

Cases referred to:
DP Vijandran v. Majlis Peguam [1995] 2 CLJ 815; [1995] 2 MLJ 391 ***(foll)***
Benge & Pratt v. Guardian Assurance Co. [1915] 34 NZLR, 81 ***(foll)***
Dato' Mohamed Hashim Shamsuddin v. Attorney General, Hongkong [1986] 2 MLJ 112 ***(foll)***
Gapari bin Kitingan v. Attorney General Malaysia [1991] 1 MLJ 159, SC ***(foll)***
Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor. [1994]4 CLJ 47; [1994] 3 AMR 40 ***(foll)***
Baharuddin bin Kamsin v. Pihak Berkuasa Sidang Panglima Armada Pengkalan TUDM Lumut [1996] 4 MLJ ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 365, 366, 424 (1)(a)
Rules of High Court, O. 1 r. 2(2), O. 39, O. 41 r. 1(8), O. 54, O. 66, r. 1
Courts of Judicature Act 1964, ss. 3, 11(1), (c), (ii) & (iv), 16(1)
Commisioner for Oaths Rules 1993, r. 12

Criminal Application No. 44-35-95
For the applicant - M. Menon; M/s. Jaafar & Menon
For the respondent - Baizura bt Hj Kamal DPP

Criminal Application No. 44-1-96
For the applicant - Devadason; M/s Devadason & Devadason
For the respondent - Norjehan DPP

Criminal Application No. 44-3-96
For the applicant - Ng Aik Guan; M/s Ching, Tan & Associates
For the respondent - Wan Ahmad Kamal DPP

JUDGMENT

Low Hop Bing J:

In these 3 separate criminal applications for various orders, the learned Deputy Public Prosecutor has raised a novel but fundamentally important question of law which has widespread and far-reaching implications in the administration of criminal justice in our country. As the question of law raised in these applications is identical, I have set out all the grounds and conclusions which shall apply to and bind all the parties herein.

The respective affidavits in support of these applications have been affirmed before a Commissioner for Oaths. The learned Deputy has raised a preliminary objection on the ground that the respective affidavits have not been affirmed before a Magistrate or Registrar and that being the case, the applicants have failed to comply with the provisions of s. 424 (1)(a) of the criminal Procedure Code, with the result that the affidavits cannot be used in a criminal Court.

The question of law for determination by the Court may be formulated as follows:

> Whether the provisions of s. 424 (1)(a) of the Criminal Procedure Code prohibit or exclude the use of an affidavit in a criminal Court if such an affidavit is sworn in the Federation before a Commissioner for Oaths and not before a Magistrate or Registrar?

It is the contention of the learned Deputy that s. 424 (1)(a) would only admit an affidavit which is sworn in the Federation before any Magistrate or Registrar, as a result of which an affidavit which is sworn, as in the instant case, before a Commissioner for oaths in the Federation, cannot be used in a criminal Court.

It is the unanimous view of all the learned Counsel for the respective applicants herein that under the provisions of s. 424(l)(a), in addition to the use, in a criminal Court, of an affidavit sworn in the Federation before any Magistrate or Registrar, an affidavit which is sworn in the Federation before a Commissioner for Oaths may be used in a criminal Court because s. 424(1)(a) does not prohibit or exclude the use of such an affidavit.

Section 424 (1)(a) reads as follows:

> (l) **Subject to any rules of Court**, any affidavit may be used in a criminal Court if it is sworn -
>
> (a) in the Federation before any Magistrate or Registrar (emphasis mine).

In my view, s. 424 (1)(a) is an enabling provision under which an affidavit which is sworn in the Federation before any Magistrate or Registrar may be used in a criminal Court. It is not intended to be an overriding, overpowering

or a dominant provision, but it is specifically enacted to make it "subject to any rules of Court". The inclusion of the phrase "subject to" in s. 424 means that s. 424 is not to be construed as an independent provision. Section 424 is not intended to stand on its own. The scope, application, operation, effect or implication of s. 424 (1)(a) is specifically bound by or made subservient to any rules of Court so that when any rules of Court are invoked in a particular instance, the rules of Court will take precedence and become the dominant provision to prevail upon the provisions of s. 424 (1)(a), in which event s. 424 will then play a secondary role or take a back seat, so to speak: See *DP Vijandran v. Majlis Peguam* [1995] 2 CLJ 815; [1995] 2 MLJ 391, 399. Although my decision in the Vijandran case has been set aside by the Court of Appeal, the statutory interpretation in relation to the phrase "subject to" and its legal connotations apparently remain intact.

Stout CJ in the New Zealand case of *Benge & Pratt v Guardian Assurance Co.* [1915] 34 NZLR 81 at p. 86 held that the phrase "subject to" means "swallowed up" or "negatived by". Hence, in its application to s. 424 (1)(a), the provisions therein are effectively negatived by "any rules of Court".

The learned Deputy further contends that pursuant to O.1 r. 2(2) of the Rules of High Court 1980, the provisions of Rules of High Court are expressly stated to be inoperative in relation to criminal proceedings.

All the learned Counsel for the respective applicants on the other hand submit that the Rules of High Court are applicable and have full force in relation to affidavits which are to be used in a criminal Court.

In my considered opinion, O. 1, r. 2(2) of the Rules of High Court is not intended to wholly or completely exclude its application to criminal proceedings. In *Dato' Mohamed Hashim Shamsuddin v. Attorney General, Hongkong* [1986] 2 MLJ 112, the then Chief Justice, Malaya, made an ***ex parte*** order allowing for the taking of evidence before the High Court upon a letter of request issued by the Hongkong High Court. The evidence was to be used in a criminal proceeding pending in Hongkong. An application was made to set aside the order and this was dismissed in the High Court. The appellant appealed. It was submitted that the impugned order was bad and must be set aside as, *inter alia*, O. 66 r.1 of the Rules of the High Court, under which it was made, does not apply in relation to criminal proceedings.

The majority of the Supreme Court held, *inter alia*, that the statutory source and enabling provision for O. 66 of the Rules of the High Court is s. 16(l) of the Courts of Judicature Act, 1964. Order 66 is properly enacted in relation to both **civil and criminal proceedings** and therefore the order made in this case is *intra vires.*

In *Gapari Bin Kitingan v. Attorney General Malaysia* [1991] 1 MLJ 159, SC, there was an appeal from the decision of the High Court dismissing the

appellant's application to set aside the *ex parte* order granting the application by the Attorney General of Malaysia for depositions of certain persons named in the application to be obtained in Hongkong and further order for the issue of a letter of request to be directed to the Supreme Court of Hongkong to request that Court to take or cause to be taken the depositions of the said persons for the purpose of criminal proceedings in Malaysia. The Supreme Court in dismissing the appeal from the High Court held, *inter alia*, that O. 39, which provides for the power to order depositions to be taken, **should be applicable not only in respect of civil but also of criminal proceedings.**

In *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994]4 CLJ 47; [1994] 3 AMR 40, 2047 the Supreme Court held, *inter alia*, that in matters relating to the format and the procedural rules as to the use of affidavits, O. 54 (relating to *habeas corpus* proceedings, which rule has now been revoked) and other related provisions may be resorted to, but the proceedings must be conducted with the strictness of a criminal trial. The Supreme Court has clearly supported the proposition that the above provisions of the Rules of High Court are operative and **applicable equally in both civil and criminal proceedings**. In the same case in the High Court [1994] 1 MLJ 592, 597, Vincent Ng J. concluded that in *habeas corpus* proceedings (being quasi-criminal), s. 424(i) read together with s. 365 and 366 of the Criminal Procedure Code clearly ordains the application of certain provisions of the Rules of High Court to *habeas corpus* proceedings.

These decisions of the Supreme Court and the High Court have established one common denominator in that notwithstanding the provisions of O.1 r. 2(2) of the Rules of High Court, it is demonstrably clear that O. 66 (obtaining of evidence for foreign courts); O. 39 (evidence by deposition: examiners of the Court); O. 54 (now revoked, but when in force, it governed *habeas corpus* proceedings), the Rules of High Court 1980 are operative and apply equally to both civil and criminal proceedings. In this context, I am of the considered view that the provisions of O. 41 regulating the use of affidavits are operative and apply equally to both civil and criminal proceedings and s. 424 is expressly enacted to be subject to any rules of Court e.g. O. 41. That being the case, the result is that an affidavit signed by a Commissioner for Oaths may be used in a criminal Court in addition to, and not in derogation from the provisions of s. 424 (1)(a). Under O. 41 r. 1(8) read with Form 78 of that rule, an affidavit may be sworn before a Commissioner for Oaths. Further, s. 11(l) of the Courts of Judicature Act 1964 states that any Registrar and any person appointed by the Chief Justice to be a Commissioner for Oaths may do all or any of the following things e.g.:

(a) Section 11(l)(c)(ii) "administer oaths for taking any affidavit or affirmation."

(b) Section 11(1)(c)(vi) "administer oaths for swearing persons in **any** action, matter or **proceeding**, which is pending or about to be instituted in any Court in any of its jurisdictions." (emphasis mine).

The use of words "any... proceeding" is significant. "Proceeding" is defined in s. 3 of the Courts of Judicature Act 1964 as any proceeding whatsoever of a **civil or criminal nature**.

Hence, it is clear that any person who is appointed a Commissioner for Oaths may administer oaths for taking any affidavit and such affidavit may be used for the purposes of any proceeding whatsoever of a civil or criminal nature.

Rule 12 of the Commissioner for Oaths Rules 1993 provides that a public officer or any other person appointed as a Commissioner for oaths may do all or any of the following e.g.:

(a) administer oaths for -

(i) ...

(ii) taking any affidavit or affirmation;

(iii) ...

(iv) swearing persons in **any** action, matter or **proceeding** which is pending or about to be instituted in any Court." (emphasis mine).

This is a restatement of the provisions of s. 11(1)(c)(ii) and (iv) of the Courts of Judicature Act 1964 and is a strong reaffirmation of the proposition that an affidavit sworn before a Commissioner for Oaths may be used. It is eminently clear to me that a Commissioner for Oaths is authorised by law to affirm an affidavit of s deponent for the purpose of using the said affidavit in a criminal Court as it is expressly provided for in s. 3 and s. 11 of the Courts of Judicature Act, 1964 and r. 12 of the the Commissioner for Oaths Rules 1993.

The approach suggested by the learned Deputy is too narrow and too restrictive and is not in consonance with the provisions of s. 424 (1)(a) of the Criminal Procedure Code, which does not contain any prohibition or restriction, either expressly or by necessary implication.

From the practical point of view, it is common knowledge that Magistrates and Registrars are already inundated with both judicial and administrative duties within the respective local limits of their jurisdiction. It is practically impossible or inconceivable for s. 424 to require each and every affidavit to be affirmed by a Magistrate or Registrar (and to exclude an affidavit sworn before a Commissioner for oaths) before it can be used in a criminal Court. If that be the case, whenever an application is to be made to a criminal Court it would be necessary to take either a Magistrate or Registrar to a prison where the

applicant is detained or to bring the applicant (who is not detained or imprisoned) to the Chambers of the Magistrate or Registrar which will inevitably and unduly interrupt the normal course of duties of a Magistrate or Registrar. Visiting hours of the prison are rather constrained. It will be time consuming and human resource draining. It is indeed difficult if not possible to find a time which is mutually convenient to a Magistrate or Registrar and to bring one of them to a prison at a time which is convenient to all parties concerned. This is certainly not the intention of the law under s. 424 (1)(a). If it is the intention of Parliament to limit the use of an affidavit in a criminal Court to an affidavit which is sworn before a Magistrate or Registrar, then s. 424 (1)(a) may have to be redrafted thus:

> No affidavit shall be used in a criminal Court unless it is sworn -
>
> (a) in the Federation before any Magistrate or Registrar.

However, this is not the case here nor are there words to that effect ever found in s. 424.

Section 424 (i)(a) of the Criminal Procedure Code should be read together with O. 41 of the Rules of High Court, s. 3 and s. 11(1) of the Courts of the of Judicature Act 1964 and r. 12 of the Commissioner for Oaths Rules 1993 and be given a liberal interpretation since there is no prohibition or restriction excluding an affidavit sworn in the Federation before a Commissioner for Oaths. I am therefore unable to uphold the objection of the learned Deputy. In the circumstances, I answer the question of law in the negative. Section 424 (1)(a.) does not prohibit or exclude the use of an affidavit in a Criminal Court if such an affidavit is sworn in the Federation before a Commissioner for Oaths. In the circumstances, I hold that the respective affidavits which were sworn in the Federation before a Commissioner for Oaths can be used in this criminal Court for the purposes of the criminal proceedings herein.

Incidentally, in the course of writing this judgment, I note that Zulkifli, JC (as he then was) in *Baharuddin bin Kamsin v. Pihak Berkuasa Sidang Panglima TUDM Lumut* [1996] 4 MLJ 190 dismissed the learned Federal Counsel's preliminary objection on the same ground as raised by the learned Deputy in the case before me. His Lordship held, *inter alia*, that an affidavit affirmed before a duly appointed Commissioner for Oaths would be in order and in compliance with the requirement of s. 424(l) of the Criminal Procedure Code.

Reported by W.A. Sharif